Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1998

WILLIAM L. MILLER,

Petitioner,

v.

J.D. ABRAMS, INCORPORATED,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Should "malicious" have a meaning independent of "willful" or should the two terms be aggregated into a unitary concept with a collective meaning for purposes of 11 U.S.C. § 523(a)(6)?

Should a creditor prevail under 11 U.S.C. § 523(a)(6) by showing the mere existence of an objective substantial certainty of harm or should a creditor have to prove either a subjective motive to cause harm or a subjective substantial certainty of harm?

PETITION FOR WRIT OF CERTIORARI

William L. Miller ("Miller") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on September 24, 1998, in order to resolve the conflict between the Fifth and Eighth Circuit Courts of Appeals on the important issues presented herein.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit that gives rise to this petition is reprinted in Appendix A hereto ("App. A") at page App-1.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit, exercising its jurisdiction under 28 U.S.C. § 158(d) reversed the judgment of the United States District Court for the Western District of Texas, Austin Division ("District Court"), and remanded this case for further proceedings consistent with its decision rendered on September 24, 1998. Pursuant to Supreme Court Rule 13.1, this petition has been filed within 90 days after the entry of the judgment.

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED IN THIS CASE

This petition seeks the Court's interpretation of 11 U.S.C. § 523(a)(6); because the provisions of this section are lengthy, its text is set out in Appendix B hereto ("App. B") at page App-18.

STATEMENT OF THE CASE

J.D. Abrams, Inc. ("Abrams") a successful Texas highway and road contractor, employed Miller from June 1985

until February 28, 1994, when Miller left his position as vice president and director at Abrams to become manager and chief operations officer of Balfour Beatty Construction, Inc. ("Balfour Beatty") in its highway division. As an officer and director of Abrams, Miller was privy to proprietary information and trade secrets. Balfour Beatty recruited Miller to start its highway division in Texas. During a series of meetings concerning his prospective employment, Miller disclosed proprietary information or trade secrets of Abrams to agents of Balfour Beatty.

On April 18, 1994, Abrams filed suit in a Texas state court against Miller and Balfour Beatty. The case was tried to a jury in November of 1995. The jury found that Miller misappropriated proprietary information or made an improper use of the trade secrets of Abrams and awarded Abrams damages of $1 million. The jury also decided that Miller had not breached any fiduciary duties owed to Abrams and that punitive damages were not appropriate because Miller did not act with "malice mean[ing] ill will, evil motive, or flagrant disregard for the rights of others."

Miller filed a voluntary chapter 7 bankruptcy petition seeking protection from the state court judgment. Abrams initiated an adversary proceeding seeking an exception to discharge under 11 U.S.C. §§ 523(a)(4) and 523(a)(6). Based on the doctrine of collateral estoppel, the United States Bankruptcy Court for the Western District of Texas, Austin Division ("Bankruptcy Court"), granted summary judgment in favor of Abrams holding that the state court judgment was a nondischargeable debt under § 523(a)(4). The Bankruptcy Court, exercising its jurisdiction under 28 U.S.C. §§ 157 and 1334, denied the parties' competing motions for summary judgment under § 523(a)(6). Miller and Abrams both appealed. The District Court affirmed holding that the state court judgment was nondischargable based on principles of collateral estoppel. Miller appealed the judgment of the District Court.

The Fifth Circuit reversed and remanded, holding that the jury's findings in the state court did not speak to whether Miller acted with fraudulent intent for purposes of § 523(a)(4) or whether an objective probability of injury existed for purposes of § 523(a)(6). Miller files this petition seeking the Court's review of the Fifth Circuit's decision with respect to the proper standard to be applied by the Bankruptcy Court when retrying the issues presented by § 523(a)(6) alone.

For purposes of determining the dischargeability of a debt under § 523(a)(6), the Fifth Circuit aggregated "willful and malicious" into a "unitary concept" or "collective concept" given this Court's recent emphasis on the fact that "willful and malicious" modifies "injury." App. A, App. 16. Applying this reasoning, the Fifth Circuit held that an injury is "willful and malicious" where there is either "an objective substantial certainty of harm or a subjective motive to cause harm." App. A, App. 16. The Court opined that the parties were free to try the issue of whether Miller's actions, objectively, were substantially certain to result in injury to Abrams. App. A, App. 17.

REASONS FOR GRANTING THE WRIT

I. The Fifth Circuit's Opinion Directly Conflicts With the Eighth Circuit's Ruling in *Long* With Respect to the Issue of Whether "Malicious" Should be Disregarded as a Separate Term for Purposes of § 523(a)(6)

The decision below is in direct conflict with the Eighth Circuit's decision in *In re Long*, 774 F.2d 875 (8th Cir. 1985). Certiorari is appropriate here. The Eighth Circuit in *Long* held that malice and willfulness are two different characteristics which "should not be lumped together to create an amorphous standard to prevent discharge for any conduct that may be judicially considered to be deplorable." *Id.* at 881. In sharp contrast, the Fifth Circuit reasoned that this Court, in deciding *Kawaauhau v. Geiger*, ___ U.S. ___, 118 S.Ct. 974, 140

L.Ed.2d 90 (1998), never indicated explicitly whether it was "analyzing solely the 'willful' prong or the 'willful and malicious' standard as a unit." App. A. App. 16. The Fifth Circuit surmised that treating the phrase as a collective concept was sensible.

On one hand, if the Fifth Circuit's opinion in *Miller* is correct, then the term "malicious" adds nothing to the analysis under 523(a)(6). On the other hand, if the Eighth Circuit's opinion in *Long* is correct, then the two terms have distinct definitions and must be analyzed separately. If willfulness does not subsume malice, the Court should articulate a workable standard to be applied in the determination of whether a debtor committed a "malicious" injury.

II. The Fifth Circuit's Opinion Directly Conflicts With the Eighth Circuit's Ruling in *Geiger* With Respect to the Issue of Whether the Standard Under § 523(a)(6) is Subjective or Objective

The decision below is in direct conflict with the Eighth Circuit's decision in *In re Geiger*, 113 F.3d 848 (8th Cir. 1997), *affirmed*, ___ U.S. ___, 118 S.Ct. 974, 140 L.Ed.2d 90 (1998). Certiorari is appropriate here. In *Geiger*, the Eighth Circuit concluded that the standard under § 523(a)(6) is subjective relying on the *Restatement (Second) of Torts* § 8A, comment a, at 15 (1965). The court correctly examined whether: (i) the debtor desired to cause the injury, *or* (ii) believed that it was substantially certain to occur. *Id.* at 852-3. In sharp contrast, the Fifth Circuit held that the standard includes an objective test – that is, whether there is an objective substantial certainty of harm. App. A, App. 16. The Court affirmed the Eighth Circuit's decision with respect to the first prong of the test for willfulness; however, a conflict remains as to the second prong.

The dissenting opinion in *Geiger* suggested that a subjective standard for either prong would be too restrictive, limiting exceptions to those rare cases where the

debtor is "foolhardy enough" to utter his intent to injure the creditor or to express his belief that the creditor's injury was substantially certain to follow. *Geiger*, 113 F.3d at 859-60. Clearly, the Fifth Circuit has adopted this reasoning with respect to the second prong. The majority opinion in *Geiger* presents the better reasoned approach. The inquiry must focus on the debtor's state of mind; the question is not what the debtor knew or should have known, the question is what the debtor knew would happen or believed would happen.

The conflict between the Fifth Circuit and Eighth Circuit regarding the appropriate analysis under § 523(a)(6) is clear and irreconcilable. Certiorari is appropriate.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

In the Matter of William L. MILLER, Debtor.

William L. MILLER, Appellant,

v.

J.D. ABRAMS INCORPORATED, Appellee.

No. 97-50842.

United States Court of Appeals,
Fifth Circuit.

Sept. 24, 1998.

C. Daniel Roberts, C. Daniel Roberts & Associates, Austin, TX, for Appellant.

R. Mark Dietz, Jerry Lee Jarrard, Jr., Dietz & Associates, Round Rock, TX, David Howard Donaldson, Jr., George, Donaldson & Ford, Austin, TX, for Appellee.

Appeal from the United States District Court for the Western District of Texas.

Before REYNALDO G. GARZA, HIGGINBOTHAM and EMILIO M. GARZA, Circuit Judges.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

Miller appeals the district court's order holding that the state court judgment debt Miller owes J.D. Abrams, Inc., is nondischargeable in bankruptcy. More specifically, Miller contests the district court's conclusion that he is precluded under the doctrine of collateral estoppel from trying in the bankruptcy court the issue necessary to decide the dischargeability question. We conclude that neither the state court jury nor the state trial judge in entering judgment on the verdict decided Miller's intent in misappropriating or misusing Abrams's proprietary

information. We REVERSE the district court's judgment and REMAND for further proceedings.

I

Abrams, a successful Texas highway and road contractor, employed Miller from June 1985 until February 28, 1994, when Miller left his position as vice president and director at Abrams to become manager and chief operations officer of Belfour Beatty, Inc.'s highway division. In his position at Abrams, Miller was privy to proprietary information and trade secrets regarding such matters as management policies, customer lists, pricing and bidding strategies, and profit margins and cost projections on specific projects. Belfour, wanting to start a competing highway division, started recruiting Miller. During a series of meetings concerning his prospective employment, Miller disclosed confidential information and trade secrets of Abrams to Belfour agents. Based on the information Miller divulged and his twenty years of experience in the road construction industry, Belfour offered Miller the COO position. Other employees of Abrams accompanied Miller in his move to Belfour.

On April 18, 1994, Abrams filed suit in Texas state court against Miller and Belfour. The case was tried to a jury in November 1995. The jury found that Miller misappropriated proprietary information or misused trade secrets and awarded Abrams damages of $1 million. The jury also decided that Miller had not breached any fiduciary duties owed Abrams and that punitive damages were not appropriate, since Miller did not act with "malice

mean[ing] ill will, evil motive, or flagrant disregard for the rights of others."

Miller filed a voluntary Chapter 7 bankruptcy petition seeking protection from the state court judgment. Abrams instigated an adversary proceeding to obtain a determination that the state court judgment was a nondischargeable debt under 11 U.S.C. §§ 523(a)(4) and 523(a)(6). Based on the doctrine of collateral estoppel, the bankruptcy court granted summary judgment in favor of Abrams. The state court judgment, it found, was nondischargeable under § 523(a)(4) since misappropriation of proprietary information was larceny per se. The bankruptcy court, however, declined to rest its summary judgment on § 523(a)(6), because the court believed that the state court jury had not decided whether Miller had inflicted a "willful and malicious injury," the requirement for nondischargeability under that section. Miller and Abrams both appealed.

The district court affirmed the judgment that the state court judgment was nondischargeable based on principles of collateral estoppel. The district court, after analyzing the § 523(a)(6) issue, stated that "[t]he bankruptcy judge was correct in finding that the judgment debt was nondischargeable on behalf of Miller by collateral estoppel." As we explained, the bankruptcy judge did not rest its grant of summary judgment upon § 523(a)(6). From context, though, it is clear that the district court found that the debt was also nondischargeable under § 523(a)(4). In doing so, the district court pointed to the jury's finding that Miller had misappropriated proprietary information or misused trade secrets for

his own advantage to the detriment of Abrams. The district court believed that this finding conclusively determined that Miller had inflicted a "willful and malicious injury" on Abrams for purposes of § 523(a)(6).

The district court also stated that "[t]he bankruptcy judge was further correct in failing to find the nondischargeability of the judgment debt pursuant to 11 U.S.C. § 523(a)(4) and was correct in overruling all of the contentions with the appellant Miller with regard to his contentions on finding the judgment debt dischargeable based upon collateral estoppel." The efforts to parse the language of the district court aside, it is clear that the judgment entered by the district court found the state court judgment to be a nondischargeable debt.

We have jurisdiction under 28 U.S.C. § 158(d).

II

We review summary judgment rulings *de novo* applying the same standards as did the lower courts. *See In re Hudson*, 107 F.3d 355, 356 (5th Cir.1997). We also review *de novo* a " 'court's decision to give full faith and credit to [a] state court judgment.' " *In re Garner*, 56 F.3d 677, 679 (5th Cir.1995) (quoting *Sanders v. City of Brady*, 936 F.2d 212, 217 (5th Cir.), *cert. denied*, 502 U.S. 1013, 112 S.Ct. 657, 116 L.Ed.2d 748 (1991)).

Since the judgment against Miller was rendered by a Texas state court, this court must apply Texas rules of preclusion. *See* 28 U.S.C. § 1738 (full faith and credit statute); *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 373, 116 S.Ct. 873, 134 L.Ed.2d 6 (1996); *In re Garner*, 56

F.3d at 679. "Under Texas law, collateral estoppel 'bars relitigation of any ultimate issue of fact actually litigated and essential to the judgment in a prior suit, regardless of whether the second suit is based upon the same cause of action.' " *In re Garner*, 56 F.3d at 679 (quoting *Bonniwell v. Beech Aircraft Corp.*, 663 S.W.2d 816, 818 (Tex.1984)).

Further, Texas law requires that:

> A party seeking to invoke the doctrine of collateral estoppel must establish (1) the facts sought to be litigated in the second action were fully and fairly litigated in the prior action; (2) those facts were essential to the judgment in the first action; and (3) the parties were cast as adversaries in the first action.

Id. at 680 (quoting *Bonniwell*, 663 S.W.2d at 818). Miller and Abrams agree that requirement (3) is met, but disagree on the degree to which the issue of Miller's intent was litigated in and essential to the state court action.

The scope of the collateral estoppel doctrine is circumscribed by the particularized findings of the jury. *See Marine Shale Processors, Inc. v. EPA*, 81 F.3d 1371, 1379 (5th Cir.1996) (Higginbotham, J.). In this case, the jury specifically answered in the affirmative, with respect to Miller, the question: "Did any of the defendants misappropriate proprietary information or make an improper use of the trade secrets of J.D. Abrams, Inc.?" Misappropriation was defined as the "wrongful taking and use of another's property." The jury answered in the negative whether Miller had acted with "malice mean[ing] ill will, spite, evil motive, or flagrant disregard for the rights of others." Based on these answers, we must decide whether the jury decided whether Miller acted with the mental state

required to satisfy either § 523(a)(4) or § 523(a)(6). We conclude that it made no such decision.

III

Under 11 U.S.C. § 523(a)(4), a debt "for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny" may not be discharged in bankruptcy. In construing this section, this court has stated that this discharge exception "was intended to reach those debts incurred through abuses of fiduciary positions and through active misconduct whereby a debtor has deprived others of their property by criminal acts; both classes of conduct involve debts arising from the debtor's acquisition or use of property that is not the debtor's." *In re Boyle*, 819 F.2d 583, 588 (5th Cir.1987).

The jury found that Miller had not breached any fiduciary duty owed Abrams. While the definition of "fiduciary" under § 523(a)(4) is controlled by federal common law rather than Texas law, it is clear that the federal common law definition is even narrower than the Texas definition. As this court noted recently, "[T]he concept of fiduciary under § 523(a)(4) is narrower than it is under the general common law. Under § 523(a)(4), 'fiduciary' is limited to instances involving express or technical trusts." *Texas Lottery Comm'n v. Tran*, 151 F.3d 339, 342 (5th Cir.1998). The instruction given to the jury in the state case here was far broader, noting that "implicit in this duty is that an officer or director may not serve his own personal interest at the expense of the corporation and its stockholders." Because the federal standard will never identify a "fiduciary" where Texas law would not,

the state court judgment is issue preclusive with respect to whether there was "fraud or defalcation while acting in a fiduciary capacity."

The § 523(a)(4) exception to discharge, however, may still apply here if Miller's actions constitute "embezzlement" or "larceny." Since Miller came into possession of Abrams's proprietary information and trade secrets lawfully, embezzlement, rather than larceny, is the § 523(a)(4) term which applies. *See Great Am. Ins. Co. v. Graziano (In re Graziano)*, 35 B.R. 589, 594 (Bkrtcy.E.D.N.Y.1983). Embezzlement is defined for purposes of § 523(a)(4) as the " 'fraudulent appropriation of property by a person to whom such property has been entrusted, or into whose hands it has lawfully come.' " *Greyhound Lines Inc. v. Thurston (In re Thurston)*, 18 B.R. 545, 550 (Bkrtcy.M.D.Ga. 1982) (quoting 3 Collier on Bankruptcy ¶ 523.14(3), 523-106 (15th ed.1981)).

The discharge exceptions are to be narrowly construed in favor of the debtor since the aim of the Bankruptcy Code is to give the debtor a fresh start. *See Tran*, 151 F.3d 339, 342. To meet the definition of "embezzlement," there must be proof of the debtor's fraudulent intent in taking the property. *See Brady v. McAllister (In re Brady)*, 101 F.3d 1165, 1173 (6th Cir.1996) ("A creditor proves embezzlement by showing that he entrusted his property to the debtor, the debtor appropriated the property for a use other than that for which it was entrusted, and the circumstances indicate fraud."); *In re Sokol*, 170 B.R. 556, 560 (Bankr.S.D.N.Y.1994); *cf. Coburn Co. v. Nicholas*, 956 F.2d 110, 111 (5th Cir.1992) (requiring an intent to defraud for a determination of whether there

has been a breach of a fiduciary relationship under § 523(a)(4)).

The jury's finding that Miller acted wrongfully in misappropriating or misusing Abrams's proprietary information does not include a finding of fraudulent intent. One can wrongfully appropriate a trade secret while acting under an erroneous belief of entitlement. The question to the jury did not decide intent. Nor did the judgment entered on the verdict since intent was not essential to the judgement. Without such a finding by the state courts, there is no preclusion.

IV

Under the Bankruptcy Code, a debtor may not be discharged from any debt "for willful and malicious injury by the debtor to another entity or to the property of another entity." 11 U.S.C. § 523(a)(6). Although we will ultimately conclude that under recent Supreme Court precedent, "willful and malicious injury" is a unitary concept entailing a single two-pronged test, courts have previously analyzed "willful" and "malicious" separately. We thus consider them here in turn.

A.

The Supreme Court recently answered the "pivotal question" of whether § 523(a)(6) covers "acts, done intentionally, that cause injury . . . or only acts done with the actual intent to cause injury." *Kawaauhau v. Geiger*, ___ U.S. ___, 118 S.Ct. 974, 977, ___ L.Ed.2d ___, ___, (1998). The Court's conclusion was that "[t]he word 'willful' in

(a)(6) modifies the word 'injury,' indicating that non-dischargeability takes a deliberate or intentional *injury*, not merely a deliberate or intentional *act* that leads to injury." *Id.* This conclusion was similar to one that the Fifth Circuit had reached in analyzing § 523(a)(6). In *Corley v. Delaney (In re Delaney)*, 97 F.3d 800 (5th Cir.1996), this court reaffirmed its earlier holding that "for willfulness and malice to prevent discharge under § 523(a)(6), the debtor must have intended the actual injury that resulted" and not just performed an intentional act that resulted in injury. *Id.* at 802.

Before we can determine whether the findings of the jury in the state court conclusively determine whether Miller inflicted a "willful . . . injury," we must grasp the Supreme Court's insistence on "actual intent to cause injury." The Supreme Court's disposition in *Kawaauhau* certainly eliminates the possibility that "willful" encompasses negligence or recklessness. *See Kawaauhau*, ___ U.S. at ___, 118 S.Ct. at 978 ("We hold that debts arising from recklessly or negligently inflicted injuries do not fall within the compass of § 523(a)(6).").

At least three remaining readings are possible. The standard might be met by any tort generally classified as an intentional tort, by any tort substantially certain to result in injury, or any tort motivated by a desire to inflict injury. We hold that the label "intentional tort" is too elusive to sort intentional acts that lead to injury from acts intended to cause injury. Rather, either objective substantial certainty or subjective motive meets the Supreme Court's definition of "willful . . . injury" in § 523(a)(6).

If "actual intent to cause injury" and intentional torts were parallel terms, issue preclusion with respect to willfulness would apply in favor of Abrams. This is because misappropriation of proprietary information and misuse of trade secrets are generally considered to be intentional torts. *See, e.g., Micro Data Base Sys., Inc. v. Dharma Sys., Inc.*, 148 F.3d 649, 653-54 (7th Cir.1998) (Posner, C.J.) ("The misappropriation of a trade secret is an intentional tort."); *Restatement (Third) Unfair Competition* § 40(b) (defining the scienter requirement for misuse of trade secrets); *see also Hyde Corp. v. Huffines*, 158 Tex. 566, 314 S.W.2d 763, 769 (1958) (relying on a similar predecessor Restatement definition in defining misuse of trade secrets); *American Derringer Corp. v. Bond*, 924 S.W.2d 773, 777 (Tex.App. – Waco 1996, no writ) (following *Hyde*).

The category of intentional torts, however, is broader. The Supreme Court did specifically refer to intentional torts, noting that "the (a)(6) formulation triggers in the lawyer's mind the category 'intentional torts,' as distinguished from negligent or reckless torts." *Kawaauhau*, ___ U.S. at ___, ___, 118 S.Ct. at 977. This acknowledgment of a logical association, however, avoids equating § 523(a)(6) torts and intentional torts, and with good reason.

Merely because a tort is classified as intentional does not mean that any injury caused by the tortfeasor is willful. This case illustrates the distinction, since misappropriation of proprietary information and misuse of trade secrets are wrongful regardless of whether injury is substantially certain to occur. *See, e.g., Restatement (Third) Unfair Competition* § 40(b) cmt. c ("[A]ny exploitation of the trade secret that is likely to result in injury to the trade secret owner *or* enrichment to the defendant is a

'use' under this section."). Misuse of trade secrets is not precisely like stealing funds from a till, because the tortfeasor's gain is not inevitably a loss to the legal owner of the secret.

Most often, an intentional tort requires either objective substantial certainty of harm or subjective motive to do harm. Indeed, the presence of one of these factors is both necessary and sufficient for a tort to be classified as an "intentional tort" under the traditional modern definition. *See Kenneth J. Vandevelde, A History of Prima Facie Tort: The Origins of a General Theory of Intentional Tort*, 19 Hofstra L.Rev. 447, 447 (1990) (describing "intentional torts" as those where "the defendant acted with the intent to injure the plaintiff or with substantial certainty that his action would injure the plaintiff").

Thus, rather than allow the general classification of a tort to be a talisman, we hearken back to this original definition of "intentional tort" to determine whether injury is "willful" for § 523(a)(6) purposes. This test is fully consistent with our precedent. *Delaney*, which remains good law because the Supreme Court in no way contradicted it, equated intending actual injury to a situation in which "the debtor intentionally took action that necessarily caused, or was substantially certain to cause, the injury." *Delaney*, 97 F.3d at 802. Although *Delaney* did not address whether a subjective motive to injure would alternatively be sufficient to trigger § 523(a)(6), it would seem peculiar to deem an action causing injury not "willful" when the tortfeasor's action was in fact motivated by a desire to cause injury.

Applying this test, we find that willful injury was not decided in the state court suit. If the subjective standard alone were the standard, issue preclusion would give Miller victory because the jury found that he did not act with "malice," defined by the court to include "evil motive." Miller's conduct, however, could still be "willful" under the objective standard, if his acts were substantially certain to result in injury to Abrams. The state court jury determined only that injury was proximately caused by Miller's acts, a less demanding standard than "substantial certainty."

B.

Miller's claim of preclusion might still seem to be vital, because § 523(a)(6) requires "willful *and malicious* injury" (emphasis added). If Miller could establish that the state court decided that his acts were not "malicious," § 523(a)(6) would not bar dischargeability. At first glance, Miller might appear to meet this burden, since the jury found no act of malice by Miller in determining whether to assess punitive damages. Unfortunately for Miller, however, the meaning of "malicious" in § 523(a)(6) is controlled by federal law rather than state law. To determine whether the definitions are sufficiently similar that the trial of one is a trial of the other requires that we define "malicious."

The law outside the Fifth Circuit concerning the meaning of "malicious" in § 523(a)(6) has long been confused. *See generally Firstmark Fin. Corp. v. Aldrich (In re Aldrich)*, 37 B.R. 860, 862-64 (Bankr.N.D.Ohio); Charles Jordan Tabb, *The Scope of the Fresh Start in Bankruptcy:*

Collateral Conversions and the Dischargeability Debate, 59 Geo. Wash. L.Rev. 56, 61-89 (1990); Karen N. Fischer, Comment, *The Exception to Discharge for Willful and Malicious Injury: The Proper Standard for Malice*, 7 Bankr.Dev. J. 245, 248-59 (1990).

Courts have divided roughly into two camps, some requiring "special malice," which requires a showing of a motive to harm, and others requiring merely "implied malice." *Compare, e.g., American Savings & Loan Ass'n v. Weber (In re Weber)*, 99 B.R. 1001, 1014-15 (Bankr.D.Utah 1989) (requiring special malice), *and Grand Piano & Furniture Co. v. Hodges (In re Hodges)*, 4 B.R. 513, 516 (Bankr.W.D.Va.1980) (same), with *United Bank v. Nelson*, 35 B.R. 766, 774 (N.D.Ill.1983) (requiring "implied malice"), *and United Va. Bank v. Fussell (In re Fussell)*, 15 B.R. 1016, 1022 (W.D.Va.1981) (same). The difference in opinion has been whether § 523(a)(6) repudiated an implied malice test previously established in *Tinker v. Colwell*, 193 U.S. 473, 24 S.Ct. 505, 48 L.Ed. 754 (1904).

The Fifth Circuit so far has taken a clear path, albeit without analysis of the confused jurisprudence. *Vickers v. Home Indem. Co.*, 546 F.2d 1149 (5th Cir.1977), defined "malicious" as " 'without just cause or excuse.' " *Id.* at 1150 (quoting 1A Collier, Bankruptcy ¶ 17.17, at 1650.4 to 1650.6 (1976)); *see also Corley v. Delaney (In re Delaney)*, 97 F.3d 800, 802 n. 6 (5th Cir.1996); *Seven Elves, Inc. v. Eskenazi*, 704 F.2d 241, 245 (5th Cir.1983); *Petty v. Dardar (In re Dardar)*, 620 F.2d 39, 40 (5th Cir.1980).

This test is thus a species of "implied malice," because no bad motive on the part of the debtor is required. *See, e.g., Black's Law Dictionary* 958 (6th ed.1990)

(defining "implied malice" for general purposes as "[m]alice inferred by legal reasoning and necessary deduction from the res gestae or the conduct of the party."). Other courts, however, have defined "implied malice" differently. *See, e.g., In re Nance*, 556 F.2d 602, 611 (1st Cir.1977) ("There need be no showing of 'special malice' toward the injured party, only that the act is done deliberately and intentionally, in knowing disregard of the rights of another.") (internal quotation marks omitted). This definition makes the "implied malice" inquiry quite close to that of the *Kawaauhau* standard for "willful . . . injury."

Ordinarily, of course, this court would be bound to its precedent, and thus would retain the "just cause or excuse" definition. The Supreme Court's decision in *Kawaauhau*, however, has displaced it. The origin of the "just cause or excuse" standard is *Tinker*, 193 U.S. at 487, 24 S.Ct. 505, but the *Kawaauhau* Court, after specifically quoting the "just cause or excuse" and other language, criticized that opinion as failing to produce a clear standard. *See* ___, ___ U.S. at ___, ___, 118 S.Ct. at 978 ("The exposition in the *Tinker* opinion is less than crystalline."). More importantly, the *Kawaauhau* Court explicitly confined the holding of *Tinker* to the collateral proposition that criminal conversation is an intentional tort. *See id.*

Thus, the roots of the "just cause or excuse" standard that this court has adopted have now been cut off. The most obvious candidates are the "special malice" and the "implied malice" standards on which most courts have focused. The "special malice" standard has been criticized for "appear[ing] to abolish section 523(a)(6) of the Code as a meaningful ground of nondischargeability."

Citizens Bank & Trust Co. v. Lewis (In re Lewis), 17 B.R. 46, 48 (Bankr.W.D.Ark.1981). While a special malice standard might still have bite for judgments involving torts like battery, it would make nondischargeability unnecessarily rare, as judgments for torts substantially certain or certain to result in injury would be discharged when a tortfeasor was merely indifferent to the injury and not acting with the end goal of causing that injury.

The implied malice standard is thus preferable. This still leaves the question of which variant of the implied malice definition is appropriate. "Without just cause or excuse" might serve as a useful general definition of implied malice, and it might have been an appropriate definition when it appeared that "willful . . . injury" might include negligent acts or acts based on mistakes of fact. This is because when a tort does not involve intentional injury to another, then it might in some circumstances be justified or excused. *See, e.g., Davis v. Aetna Acceptance Co.*, 293 U.S. 328, 332, 55 S.Ct. 151, 79 L.Ed. 393 (1934) ("There may be an honest, but mistaken belief engendered by a course of dealing, that powers have been enlarged or incapacities removed. In these and like cases, what is done is a tort, but not a willful and malicious one.").

The "just cause or excuse" approach is peculiarly inappropriate, however, given the Supreme Court's definition of "willful . . . injury" in *Kawaauhau*. Where injury is intentional, as it now must be under *Kawaauhau*, it cannot be justified or excused. Eliminating the "just cause or excuse" exception would not ensnare those who have acted under "an honest, but mistaken belief." Such an individual cannot be said to have intentionally caused

injury, since legally cognizable injury would not meet the test of "not substantially certain to result," in the absence of the fact about which there has been mistake.

Thus, we adopt the alternative definition of "implied malice." Because this standard is synonymous to the *Kawaauhau* standard for "willful injury," "acts done with the actual intent to cause injury," *id.* at ___, 118 S.Ct. at 975, we hold that this is the test for "willful and malicious injury" under § 523(a)(6). Thus, we hold that an injury is "willful and malicious" where there is either an objective substantial certainty of harm or a subjective motive to cause harm.

Kawaauhau does not foreclose, even encourages, this approach. That case never makes explicit whether it is analyzing solely the "willful" prong or the "willful and malicious" standard as a unit. Aggregating "willful and malicious" into a unitary concept might be inappropriate if the word they modified were "act," but treatment of the phrase as a collective concept is sensible given the Supreme Court's emphasis on the fact that the word they modify is "injury."

It is worth noting that this interpretation of § 523(a)(6) comes quite close to that recommended by commentators who, pre-*Kawaauhau*, have considered the definition of "malicious." *See Tabb, supra*, at 104 (propounding a "knowing violation" test, wherein the debtor must have been aware that its act violated the legal rights of the creditor); *Fischer, supra*, at 258-59 ("The critical inquiry under this standard is whether the debtor knew, or should have known, that his actions would cause harm to the creditor.").

Applying this analysis to the instant case is straightforward. The word "malicious" does not change the conclusion. Thus, on the § 523(a)(6) claim, we find that issue preclusion does not apply in favor of either party. If Miller's actions were at least substantially certain to result in injury to Abrams, then the debt is nondischargeable under § 523(a)(6). Otherwise, neither the objective nor the subjective standard is met, and the debt is dischargeable.

V

Since the jury's findings in the state court did not speak to whether Miller acted with fraudulent intent or the objective probability of injury from Miller's tortious acts, the parties are free to try this issue for the first time. Accordingly, we REVERSE the district court's judgment and REMAND for proceedings consistent with this opinion, including entry of summary judgment on the facts if appropriate.

APPENDIX B

11 U.S.C. § 523. Exceptions to discharge.

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt –

(1) for a tax or a customs duty –

(A) of the kind and for the periods specified in section 507(a)(2) or 507(a)(8) of this title, whether or not a claim for such tax was filed or allowed;

(B) with respect to which a return, if required –

(i) was not filed; or

(ii) was filed after the date on which such return was last due, under applicable law or under any extension, and after two years before the date of the filing of the petition; or

(C) with respect to which the debtor made a fraudulent return or willfully attempted in any manner to evade or defeat such tax;

(2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by –

(A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition;

(B) use of a statement in writing –

(i) that is materially false;

(ii) respecting the debtor's or an insider's financial condition;

(iii) on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and

(iv) that the debtor caused to be made or published with intent to deceive; or

(C) for purposes of subparagraph (A) of this paragraph, consumer debts owed to a single creditor and aggregating more than $1,000 for "luxury goods or services" incurred by an individual debtor on or within 60 days before the order for relief under this title, or cash advances aggregating more than $1,000 that are extensions of consumer credit under an open end credit plan obtained by an individual debtor on or within 60 days before the order for relief under this title, are presumed to be nondischargeable: "luxury goods or services" do not include goods or services reasonably acquired for the support or maintenance of the debtor or a dependent of the debtor; an extension of consumer credit under an open end credit plan is to be defined for purposes of this subparagraph as it is defined in the Consumer Credit Protection Act;

(3) neither listed nor scheduled under section 521(1) of this title, with the name, if known to the debtor, of the creditor to whom such debt is owed, in time to permit –

(A) if such debt is not of a kind specified in paragraph (2), (4), or (6) of this subsection, timely filing of a proof of claim, unless such creditor had notice or actual knowledge of the case in time for such timely filing; or

(B) if such debt is of a kind specified in paragraph (2), (4), or (6) of this subsection, timely filing of a proof of claim and timely request for a

determination of dischargeability of such debt under one of such paragraphs, unless such creditor had notice or actual knowledge of the case in time for such timely filing and request;

(4) for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny;

(5) to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record, determination made in accordance with State or territorial law by a governmental unit, or property settlement agreement, but not to the extent that –

(A) such debt is assigned to another entity, voluntarily, by operation of law, or otherwise (other than debts assigned pursuant to section 408(a)(3) of the Social Security Act, or any such debt which has been assigned to the Federal Government or to a State or any political subdivision of such State); or

(B) such debt includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance, or support;

(6) for willful and malicious injury by the debtor to another entity or to the property of another entity;

(7) to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss, other than a tax penalty –

(A) relating to a tax of a kind not specified in paragraph (1) of this subsection; or

(B) imposed with respect to a transaction or event that occurred before three years before the date of the filing of the petition;

(8) for an educational benefit overpayment or loan made, insured or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution, or for an obligation to repay funds received as an educational benefit, scholarship or stipend, unless –

(A) such loan, benefit, scholarship, or stipend overpayment first became due more than 7 years (exclusive of any applicable suspension of the repayment period) before the date of the filing of the petition; or

(B) excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtor's dependents;

(9) for death or personal injury caused by the debtor's operation of a motor vehicle if such operation was unlawful because the debtor was intoxicated from using alcohol, a drug, or another substance;

(10) that was or could have been listed or scheduled by the debtor in a prior case concerning the debtor under this title or under the Bankruptcy Act in which the debtor waived discharge, or was denied a discharge under section 727(a)(2), (3), (4), (5), (6), or (7) of this title, or under section 14c (1), (2), (3), (4), (6), or (7) of such Act;

(11) provided in any final judgment, unreviewable order, or consent order or decree entered in any court of the United States or of any State, issued by a Federal depository institutions regulatory agency, or contained in any settlement agreement entered into

by the debtor, arising from any act of fraud or defalcation while acting in a fiduciary capacity committed with respect to any depository institution or insured credit union;

(12) for malicious or reckless failure to fulfill any commitment by the debtor to a Federal depository institutions regulatory agency to maintain the capital of an insured depository institution, except that this paragraph shall not extend any such commitment which would otherwise be terminated due to any act of such agency;

(13) for any payment of an order of restitution issued under title 18, United States Code;

(14) incurred to pay a tax to the United States that would be nondischargeable pursuant to paragraph (1);

(15) Not of the kind described in paragraph (5) that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record, a determination made in accordance with State or territorial law by a governmental unit unless –

(A) the debtor does not have the ability to pay such debt from income or property of the debtor not reasonably necessary to be expended for the maintenance or support of the debtor or a dependent of the debtor and, if the debtor is engaged in a business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business; or

(B) discharging such debt would result in a benefit to the debtor that outweighs the detrimental consequences to a spouse, former spouse, or child of the debtor;

(16) for a fee or assessment that becomes due and payable after the order for relief to a membership association with respect to the debtor's interest in a dwelling unit that has condominium ownership or in a share of a cooperative housing corporation, but only if such fee or assessment is payable for a period during which –

(A) the debtor physically occupied a dwelling unit in the condominium or cooperative project; or

(B) the debtor rented the dwelling unit to a tenant and received payments from the tenant for such period,

but nothing in this paragraph shall except from discharge the debt of a debtor for a membership association fee or assessment for a period arising before entry of the order for relief in a pending or subsequent bankruptcy case;

(17) for a fee imposed by a court for the filing of a case, motion, complaint, or appeal, or for other costs and expenses assessed with respect to such filing, regardless of an assertion of poverty by the debtor under section 1915(b) or (f) of title 28, or the debtor's status as a prisoner, as defined in section 1915(h) of title 28; or

(18) owed under State law to a State or municipality that is –

(A) in the nature of support, and

(B) enforceable under part D of title IV of the Social Security Act (42 U.S.C. 601 *et seq.*).

(b) Notwithstanding subsection (a) of this section, a debt that was excepted from discharge under subsection (a)(1), (a)(3), or (a)(8) of this section, under section 17a(1),

17a(3), or 17a(5) of the Bankruptcy Act, under section 439A of the Higher Education Act of 1965, or under section 733(g) of the Public Health Service Act in a prior case concerning the debtor under this title, or under the Bankruptcy Act, is dischargeable in a case under this title unless, by the terms of subsection (a) of this section, such debt is not dischargeable in the case under this title.

(c) (1) Except as provided in subsection (a)(3)(B) of this section, the debtor shall be discharged from a debt of a kind specified in paragraph (2), (4), (6), or (15) of subsection (a) of this section, unless, on request of the creditor to whom such debt is owed, and after notice and a hearing, the court determines such debt to be excepted from discharge under paragraph (2), (4), (6), or (15) as the case may be, of subsection (a) of this section.

(2) Paragraph (1) shall not apply in the case of a Federal depository institutions regulatory agency seeking, in its capacity as conservator, receiver, or liquidating agent for an insured depository institution, to recover a debt described in subsection (a)(2), (a)(4), (a)(6), or (a)(11) owed to such institution by an institution-affiliated party unless the receiver, conservator, or liquidating agent was appointed in time to reasonably comply, or for a Federal depository institutions regulatory agency acting in its corporate capacity as a successor to such receiver, conservator, or liquidating agent to reasonably comply, with subsection (a)(3)(B) as a creditor of such institution-affiliated party with respect to such debt.

(d) If a creditor requests a determination of dischargeability of a consumer debt under subsection (a)(2) of this section, and such debt is discharged, the court shall grant judgment in favor of the debtor for the costs of, and a reasonable attorney's fee for, the proceeding if the court finds that the position of the creditor was not

substantially justified, except that the court shall not award such costs and fees of special circumstances would make the award unjust.

(e) Any institution-affiliated party of a [sic] insured depository institution shall be considered to be acting in a fiduciary capacity with respect to the purposes of subsection (a)(4) or (11).